Federal Court Cour fédérale

Date: 20141006

Docket: T-2439-97

Citation: 2015 FC 1066

Ottawa, Ontario, October 6, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE LOUIS BULL BAND, CHIEF SIMON THREEFINGERS, JONATHAN BULL, JOSEPH DESCHAMPS, CLYDE ROASTING, RUSSELL THREEFINGERS, HARVEY ROASTING, ELAINE ROASTING, TELLY RAINE AND IRVIN BULL, the Chief and Councillors of the Louis Bull Band suing in their representative capacity on behalf of all the members of the Louis Bull Band

Plaintiffs (Respondents)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant (Moving Party)

ORDER AND REASONS

I. Overview

[1] This is a motion for summary judgment brought by Canada seeking the dismissal of the claims of the Louis Bull Band [Band]. The Plaintiffs' claim relates to the surrender of a portion of its reserve in 1909. The Plaintiffs allege that the surrender was not in their interests, and was completed for the sole purpose of accommodating white settlers.

It is alleged that Canada breached an implied term of the surrender by failing to sell all the land quickly and violated its fiduciary duty by failing to disclose, at the time of surrender, that the lakebed portion of the lands could never be sold and that mineral rights would be irretrievably lost. Further, the surrender was not in accordance with the surrender provisions of the *Indian Act, 1906*.

The Statement of Claim was filed in November 1997 and amended on April 20, 2012.

[2] The Defendant moved for summary judgment on the basis that the claims are barred by operation of the Alberta *Limitation of Actions Act*. It also pleads that the Plaintiffs' claim has no chance of success in light of the historical record and that certain claims are "unnecessary or premature".

[3] Importantly, both in writing and orally before the Court, the Plaintiffs confirmed that they do not challenge the application of limitations periods to the claim. In particular, they do not rely on *Manitoba Métis Federation v Canada*, 2013 SCC 14, [2013] 2 CNLR 281 [*Manitoba Métis*] to argue that the limitations periods should not apply and they do not seek to raise any

constitutional issues as regards limitations periods not applying to claims which engage the honour of the Crown.

[4] As a consequence, this Order and Reasons addresses only the question of whether the causes of action is barred by the Alberta *Limitation of Actions Act* six (6) year time period. Specifically, the ultimate question on this motion is whether the application of the limitations periods to the causes of action pleaded raises a genuine issue for trial.

[5] The motion will be allowed in part. The Plaintiffs knew or ought to have known, by 1987 at the latest, the material facts which were disclosed in the Gainer Report. Therefore, the following claims will be dismissed by reason of the *Limitations Act*:

a) breach of fiduciary duty in brokering the surrender;

b) breach of the *Indian Act* surrender provisions;

c) delay in selling the unrestricted lands;

d) delay in selling the HBC Lands; and

e) failure to sell or lease the Lake Lands.

[6] The Court concludes that the Defendant has not established that the material facts necessary, to give rise to the following actions, were known or should have been known by the Plaintiffs outside of the limitation period:

a) breach of fiduciary duty by accepting the surrender of the HBC Lands when the Crown knew or ought to have known that these lands could not be sold at the time;

b) failing to advise the Plaintiffs of the restrictions on the sale of the HBC Lands at the time of surrender;

c) breach of fiduciary duty by accepting the surrender of the HBC Lands when the Crown knew or ought to have known that these lands could not be sold;

d) failing to advise the Plaintiffs of the restrictions on the sale of the Lake Lands at the time of surrender; and

e) the surrender of mineral rights or subsequent alienation of those rights to third parties.

II. Background

A. *The Causes of Action*

[7] The following causes of action are pleaded in the Further Amended Statement of Claim filed April 20, 2012:

a) breach of fiduciary duties in respect of taking the 1909 surrender;

b) failure to adhere to the surrender requirements of the *Indian Act*;

c) delay in selling the non-Lake and non-HBC parcels;

d) re Lake Lands:

  i) accepting the surrender of the Lake Lands despite being aware of the prohibition against their sale;

  ii) not selling or leasing the Lake Lands;

  iii) not advising the Plaintiffs of the prohibition against the sale of the Lake Lands at the time of surrender;

e) re HBC Lands:

i) accepting the surrender of the HBC Lands despite being aware of the dispute which prevented their sale until the 1920s;

ii) not selling or leasing the HBC Lands until 1925;

iii) not advising the Plaintiffs of the dispute and its likely effect on the sale; and

f) accepting the surrender of mineral rights and then alienating these rights to third parties.

[8] The second cause of action (violation of the *Indian Act* surrender provisions) was abandoned by the Plaintiffs prior to the hearing.

[9] The claims made are, for purposes of the *Limitations Act*, all related to fiduciary duties except claim b) which is a breach of statutory obligation.

[10] Although, in oral argument the Defendant argued that the claim in respect of mineral rights was first advanced in the Fresh as Amended Statement of Claim in 2012 (an issue of limitation period), that is incorrect. Mineral rights are mentioned in the 1997 Statement of Claim filed on November 12, 1997, at paragraph 42 thereof.

[11] I have concluded that all causes of action were advanced on November 12, 1997. Therefore, the causes of action are time barred if they arose before November 12, 1991.

III. Relevant Legislation

[12] The applicable *Federal Courts Rules*, SOR/98-106, regarding motions for summary judgment are Rules 213-215:

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	213. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
(2) If a party brings a motion for summary judgment or summary trial, the party may not bring a further motion for either summary judgment or summary trial except with leave of the Court.	(2) Si une partie présente l'une de ces requêtes en jugement sommaire ou en procès sommaire, elle ne peut présenter de nouveau l'une ou l'autre de ces requêtes à moins d'obtenir l'autorisation de la Cour.
(3) A motion for summary judgment or summary trial in an action may be brought by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.	(3) La requête en jugement sommaire ou en procès sommaire dans une action est présentée par signification et dépôt d'un avis de requête et d'un dossier de requête au moins vingt jours avant la date de l'audition de la requête indiquée dans l'avis.
(4) A party served with a motion for summary judgment or summary trial shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of motion for the	(4) La partie qui reçoit signification de la requête signifie et dépose un dossier de réponse au moins dix jours avant la date de l'audition de la requête indiquée dans l'avis de requête.

hearing of the motion.

214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

214. La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l’instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l’existence d’une véritable question litigieuse.

215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

215. (1) Si, par suite d’une requête en jugement sommaire, la Cour est convaincue qu’il n’existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) If the Court is satisfied that the only genuine issue is

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

a) la somme à laquelle le requérant a droit, elle peut ordonner l’instruction de cette question ou rendre un jugement sommaire assorti d’un renvoi pour détermination de la somme conformément à la règle 153;

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(3) Si la Cour est convaincue qu’il existe une véritable question de fait ou de droit litigieuse à l’égard d’une déclaration ou d’une défense, elle peut :

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[13] In regard to prescription, absent another specific provision in federal legislation, the *Federal Courts Act* invokes the limitation provisions of the applicable province as does the *Crown Liability and Proceedings Act*:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

39. (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

Federal Courts Act, RSC 1985, c F-7

32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any

32. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait

cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

Crown Liability and Proceedings Act, RSC 1985, c C-50

[14] As the matters at issue arose in Alberta, its prescription legislation, *Limitation of Actions Act,* operates to impose a six (6) year period within which to commence the causes of action at issue here:

> 4 (1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting
>
> Within 6 years after the cause of action arose
>
> …
>
> 6 When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part 2 as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.
>
> …
>
> 40 Subject to the other provisions of this Part, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.
>
> *Limitation of Actions Act*, RSA 1980 c L-15

[15] In 1996, the 1980 *Limitation of Actions Act* was replaced by the *Limitations Act 1996*, the relevant portions of which are:

> 1(a) "claim" means a matter giving rise to a civil proceeding in which a claimant seeks a remedial order
>
> …
>
> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
>
> …
>
> 11. If, within 10 years after the claim arose, a claimant does not seek a remedial order in respect of a claim based on a judgment or order for the payment of money, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim
>
> …

> 13. An action brought, after the coming into force of this Act, [May 1, 1996] by an aboriginal people against the Crown based on a breach of a fiduciary duty alleged to be owed by the Crown to those people is governed by the law on limitation of actions as if the *Limitation of Actions Act*, RSA 1980 c L 15, had not been repealed and this Act were not in force.
>
> *Limitations Act*, RSA 1996 c L-15.1

The 2000 replacement legislation preserved the relevant portions of the 1996 Act.

[16] Regarding the surrender of reserve land, the *Indian Act of 1906*, RSC 1906 c 81, provided:

49 Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.	49 Sauf les restrictions autrement établies par la présente Partie, nulle cession et nul abandon d’une réserve ou d’une partie de réserve à l’usage d’une bande, ou de tout sauvage individuel, n’est valide ni obligatoire, à moins que la cession ou l’abandon ne soit ratifié par la majorité des hommes de la bande qui ont atteint l’âge de vingt et un ans révolus, à une assemblée ou à un conseil convoqué à cette fin conformément aux usages de la bande, et tenu en présence du surintendant général, ou d’un fonctionnaire régulièrement autorisé par le gouverneur en conseil ou par le surintendant général à y assister.
(2) No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in	(2) Nul sauvage ne peut voter ni assister à ce conseil s’il ne réside habituellement sur la réserve en question ou près de cette réserve, et s’il n’y a un intérêt.

question.

(3) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.

…

(3) Le fait que la cession ou l'abandon a été consenti par la bande à ce conseil ou assemblée doit être attesté sous serment, par le surintendant général ou par le fonctionnaire autorisé par lui à assister à ce conseil ou assemblée, et par l'un des chefs ou des anciens qui y a assisté et y a droit de vote, devant un juge d'une cour supérieure, cour de comté ou de district, ou devant un magistrat stipendiaire ou un juge de paix, ou, dans le cas de réserves dans les provinces du Manitoba, de la Saskatchewan ou d'Alberta ou dans les territoires, devant le commissaire des sauvages, et dans le cas de réserves dans la Colombie-Britannique, devant le surintendant visiteur des sauvages de la Colombie-Britannique, ou, dans l'un ou dans l'autre cas, devant quelque autre personne ou employé à ce spécialement autorisé par le gouverneur en conseil.

…

[17] The relevant portion of the creation of reserve lands under Treaty 6 , which covers the lands and the Band, is provided here:

> The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits, that is to say:

…

> <u>And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada;</u> provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the Bands here represented, in extinguishment of all claims heretofore preferred.
>
> (Court underlining)

IV. <u>Historical Facts Alleged</u>

[18] Louis Bull Band adhered to Treaty 6 in 1877. At the time of signing, band members appeared to have resided near Pigeon Lake, Alberta. Around 1886, with the encouragement of the Department of Indian Affairs [DIA], they moved from Pigeon Lake to their present location near Peace Hills (Hobbema), Alberta, where they and three other First Nations (Ermineskin, Samson and Montana) were allocated reserves. A small Pigeon Lake Reserve was set aside as a fishing camp for the four Hobbema First Nations. In subsequent years, Pigeon Lake became a

popular tourist destination, and oil was discovered there. Today, all four Hobbema First Nations share in revenue derived from oil on the Pigeon Lake Reserve.

[19] Indian Reserve No 138 was set apart for the joint use and benefit of the Indians of Louis Bull and Ermineskin Bands in the mid 1880s. In 1897, the Department instructed a Dominion Land Surveyor to survey the dividing line between Ermineskin and Louis Bull's Reserves but no further action was taken at that time.

[20] In the early 20th century, land in the Hobbema area became quite valuable. It was excellent for agricultural purposes and a railroad, passing through Hobbema, provided easy transportation for people and crops. Beginning in 1906, the DIA began to consider how it could persuade the Hobbema First Nations to surrender portions of their Reserves, particularly portions lying near the railroad. The white settlers desired to obtain the surrender of some of the reserve land in order to survey a town site at the Hobbema railway siding.

[21] In early 1906, J.S. Markle, Inspector of Indian Agencies in Alberta, suggested to his superiors that the four Hobbema bands be merged into two because once amalgamated, the bands would not be entitled to the amount of land currently under reserve status. In a letter to the Indian Commissioner, David Laird, dated January 6, 1906, Markle estimated that if Ermineskin and Louis Bull were formally amalgamated, the resulting band would be entitled to 10.5 square miles less than that controlled by the two Bands separately. The local Indian Agent, Mann, wrote at the end of January 1906 advising that such an amalgamation was highly unlikely, given the difficult relationship between the two bands.

[22] In March 1906, the Deputy Superintendent, General Pedley, retained Reverend John McDougall, a Methodist clergyman and missionary, who enjoyed a position of great trust among many First Nations in the area. McDougall was instructed to act as agent for the Government in broaching as quickly as possible the question of surrender with the Hobbema Indians and to fix the minimum price, which was to be "as low as possible".

[23] In May 1906, the Samson Band agreed to surrender part of its reserve for sale. The first clause of the agreement stated that the surrender was conditional on that "your Department will not again for a long time ask us to make another surrender of our lands". When McDougall communicated this surrender to Indian Affairs officials in Ottawa, they initially rejected it due to the distance of the surrendered lands from the railroad. McDougall urged the government to accept the surrender, suggesting that if accepted, Ermineskin and Montana would be more likely to surrender portions of their reserve near the railway. The government refused to accept the original terms of surrender.

[24] In February 1907, the local Indian Agent approached the Samson Band attempting to persuade them to surrender lands closer to the railway. In August 1907, the Samson Band indicated to McDougall that they were now also willing to surrender a portion of their reserve near the railway; however, this was not acknowledged by the government. In December 1908, the Samson Band proposed a surrender of a more substantial portion near the railway. McDougall wrote to Indian Affairs communicating the offer, which he urged they accept as it would likely induce other bands to surrender portions of their reserves. Specifically, he advised

that Louis Bull Band was likely to accept a surrender if their reserve with Ermineskin was split. In response to the letter, in January 1909, the government accepted the Samson Band's proposal.

[25] In April 1909, Chief Accountant for the Department of Indian Affairs wrote to General Pedley advising that the boundary between Louis Bull and Ermineskin Reserves be surveyed, as "Muddy Bull would probably surrender a certain portion of their own reserve, and the first step to be taken is to have it properly divided". It appears that in the early summer of 1909, McDougall had some discussions with Chief Louis Bull regarding a potential surrender following the division.

[26] On June 22, 1909, the Indian Reserve No 138 was divided into IR No 138A and 138B for the exclusive use of the Ermineskin and Louis Bull bands. The boundary between the two reserves was surveyed a week later. Contrary to custom, no Order-in-Council was passed establishing the two separate reserves.

[27] On August 3, 1909, DIA Secretary, J.D. McLean, sent instructions to the surveyor requesting he finalize surveys at the Band in advance of the surrender. The following day, McLean sent a telegram to McDougall advising that the Band was willing to surrender, and requested that he submit the DIA's surrender proposition to the Band. He wondered whether Agent Mann might be able to take the surrender himself.

[28] McDougall replied to McLean on August 7 advising that he could be present on August 13, but that he had to leave by August 15 to attend to other duties.

[29] On August 9, Agent Mann received a letter from the DIA advising that the surrender forms for the portion of the Band Reserve had been mailed to McDougall with instructions to submit them to the Indians. Mann was instructed to render McDougall “all assistance possible”.

[30] The surrender forms sent to McDougall on August 9 (and referred to in the letter to Agent Mann that same day) authorized him to submit, according to the terms of the *Indian Act*, a surrender proposal to members of the Band. Enclosed was a cheque for $2,000 which was to cover the cash advance payment distributed upon acceptance of the proposal.

[31] Shortly thereafter McDougall and Agent Mann met with members of the Band to discuss the proposed surrender. The Band members present advised that they wanted the 10% advance to be used to purchase fencing materials, to enclose the reserve, and that they wanted the remaining 50% of the proceeds from the sale to be distributed to band members over a ten year period (the remaining proceeds could not be accessed at that time).

[32] On August 14, McDougall sent a telegram to the DIA in Ottawa advising that the terms of surrender had been found satisfactory by the leadership of the Band, and that they wanted their initial 10% pre-sale payment to be spent on purchasing fencing materials for the reserve. On August 16, the Department agreed to these terms.

[33] A formal meeting of the eligible electors of the Band was summoned on August 17 to consider and vote upon the surrender proposals. A voter list kept by Mann at this meeting indicates that 16 eligible voters from the Band were present and unanimously voted in favour of

the surrender. McDougall did not attend. Agent Mann did attend and represented the DIA. Unlike McDougall, Agent Mann had not been officially authorized to perform this duty. Agent Mann had only been authorized to assist in the surrender, not to take it.

[34] The surrender document was signed by six members of the Band. An affidavit was signed by Agent Mann as well as Chief Louis Bull. Following the vote, the Band members were paid a cash sum advanced on the basis of the estimated sales revenue.

Agent Mann forwarded the surrender documents to Ottawa. The surrender was accepted by an Order of the Privy Council dated August 20, 1909.

[35] 5,800 acres were included in the surrender; however, only 5,308 acres were ultimately sold for the Plaintiffs' benefit. The remaining 492 acres consisted of Bear Lake and Louis Lake [the Lake Lands] and were permanently reserved from sale by operation of the *Irrigation Act* and thus, would never be sold. A further 499 acres were reserved from sale for a 16 year period pending the resolution of a title dispute with the Hudson's Bay Company [the HBC Lands].

[36] The first auction sale of the surrendered lands took place in November 1909, resulting in the sale of 19 parcels. A second sale of seven parcels took place in June 1910. During the course of the 1920s and 1930s, the remaining 17 parcels were sold by private negotiation.

[37] By 1937, Louis Lake had dried up. Today, both Louis Lake and Bear Lake are dry. While the Lake Lands cannot be sold, some portions of them have been lost by accretion to adjoining

land owners whose parcels are described by reference to the lake boundaries. Further, the Lake Lands are currently being used for grazing without charge.

[38] In the 1970s, the Treaty and Aboriginal Rights Research [TAAR] group of the Indian Association of Alberta [IAA] conducted general research into the creation of the IR 138 “B” reserve and the 1909 Surrender. A Band Council Resolution [BCR] of the Band dated September 10, 1973, authorizes TAAR to “provide the services to the Louis Bull Band to investigate land claims and other Treaty and Aboriginal Rights”. This research culminated in a report by TAAR dated December 1977 entitled “History of the Land of the Louis Bull Indian Reserve #138B” [the Gainer Report]. There is no information on Gainer’s qualifications.

[39] The first portion of the Gainer Report focuses on the circumstances of the move from Pigeon Lake to Hobbema. Gainer concluded that it is unlikely that the Band could substantiate a claim relating to Pigeon Lake.

[40] Next, the Report considers the terms of the Band’s 1909 Surrender, considering: whether the surrender was in the best interests of the Band; whether it was carried out legally according to the terms of the *Indian Act* in effect at the time; and whether the terms of surrender were carried out properly.

[41] In respect of the surrender requirements of the *Indian Act*, the Gainer Report found: that the surrender was approved by the majority of adult male members of the Band; that a special meeting was called for discussing and voting on the surrender; and that the voters lived on or

near the reserve and had an interest in it. Gainer found, however, that the surrender meeting was not held in the presence of an officer authorized by the Superintendent-General of Indian Affairs to attend the meeting. Only McDougall was so authorized, and he was not present. Accordingly, the surrender requirements of the *Indian Act* were not met.

[42] Gainer then considered whether a trust relationship existed between the Crown and the Band. She concluded that the Crown was likely a trustee of the surrendered land after the surrender, but not before. Even if a trust relationship had existed prior to the surrender, Gainer was of the opinion that no breach had occurred.

[43] Gainer went on to consider the subsequent sale of the surrendered lands and concluded that they had been done in good faith, despite certain “technicalities”.

[44] The Gainer Report concluded with the following recommendations:

> (1) A legal opinion should be sought as to whether the violations of certain provisions of the Indian Act which occurred were enough to invalidate the surrender, or whether they could be useful in negotiating with the Department of Indian Affairs…
>
> (2) With regard to the sales of the surrendered land, it seems that the only practices of the Department which are questionable involve accounting inaccuracies. To resolve this issue would necessitate an enormously time consuming examination of all Trust Fund ledgers and land sales files. It is the opinion of this researcher that such a project would result in very little material benefit (in the particular case of the Louis Bull Reserve).
>
> (3) The question of the ownership of Louis Lake (ie whether the land under water was never surrendered, or whether it was simply not sold) should be finally settled with the Department of Indian Affairs, if this has not already been done.

[45] In December 1987, a Specific Claim regarding the 1909 Surrender was submitted by the IAA on the Band's behalf by Donald J. McMahon [McMahon Report]. The McMahon Report reviewed the history of the surrender and considered the following questions:

1. the failure by the Crown in right of Canada to fulfill its fiduciary obligations to the Louis Bull Band;
2. the failure to observe the proper sequence of procedures in creating a new reserve out of one which had been properly selected, surveyed and confirmed by Order-in-Council; and
3. the impermissibility of a delegate empowered by authority to perform a certain act in turn sub-delegating the performance of this act to an unauthorized party.

[46] The Report considered the Supreme Court's ruling in *Guerin v The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120 [*Guerin*], and concluded that Canada had breached its fiduciary obligations to the Band by failing to consider how the surrender would affect its interests. McMahon also found that no Order-in-Council confirming the existence of Louis Bull IR No 138B was ever passed, and the surrender was therefore invalid because it did not obtain the approval of Ermineskin members who, at least officially, also had an interest in the surrendered lands. He finally concluded that only McDougall was authorized by the Superintendent-General of Indian Affairs to take the surrender and Agent Mann was not authorized to stand in his place.

V. Procedural Facts

[47] The Plaintiffs filed their Statement of Claim on November 12, 1997. It was agreed between the parties that a Statement of Defence would not be required until such time as the

Specific Claims process had been completed. The proceedings were eventually put under case management.

[48] The Plaintiffs filed an Amended Statement of Claim on August 7, 2003.

[49] On September 12, 2003, counsel for the Plaintiffs wrote to the Court advising that they had received instructions to abandon its claim for consideration by the Specific Claims Tribunal in favour of moving ahead with the litigation.

[50] The Defendant filed its Statement of Defence on December 22, 2003.

[51] The Defendant brought a Notice of Motion for summary judgment on March 30, 2010.

[52] The Plaintiffs brought a motion for leave to amend the Statement of Claim on October 12, 2011. On January 12, 2012, the Defendant indicated it would consent to proposed amendments. It also delivered a second Demand for Particulars regarding the amended pleadings to be filed.

[53] The Plaintiffs filed their Further Amended Statement of Claim on March 13, 2012. The Defendant filed its Amended Statement of Defence on September 14, 2012. The Defendant filed the Application Record on November 29, 2013. The Plaintiffs filed their Responding Record on February 28, 2014.

VI. Current Claim – Further Amended Statement of Claim

[54] In its Further Amended Statement of Claim, the Plaintiffs plead that the 1909 Surrender was done for the sole purpose of accommodating the demands of white settlers in the Hobbema area, without due consideration for the interests of the Band. Pursuant to Treaty 6, reserve lands can only be sold or otherwise disposed of by Canada for the use and benefit of the Band, with their consent.

[55] The Plaintiffs further plead that an express or implied term of the surrender was that the surrendered lands would be sold for the benefit of the Band. This term was violated when the Crown failed to sell all of the surrendered parcels (with the exception of the Lake Lands, which were never sold) until the 1930s.

[56] In respect of the Lake Lands and HBC Lands, the Plaintiffs contend that any consent to the surrender was improperly obtained in that it was based on fraudulent or negligent misrepresentations and in breach of Canada's fiduciary and trust obligations. At the time of the surrender, Canada failed to disclose the following to the Plaintiffs:

- that a portion of the surrendered lands were reserved from sale until 1925 pending the resolution of a title dispute with the Hudson's Bay Company [HBC Lands]; and
- that a portion of the surrendered land which was covered by the waters of Bear Lake and Louis Lake at the time of the surrender [the Lake Lands] was permanently reserved from sale by operation of the *Irrigation Act*.

[57] It is claimed that prior to granting the surrender, the Plaintiffs were led to believe by the Defendant that there was great demand for lands in the area. Relying on these representations, the Plaintiffs understood and reasonably expected they would receive the proceeds due to them from the sale of the surrendered lands, including the Lake Lands and HBC Lands, within a reasonable period of time.

[58] The Plaintiffs plead that the surrender failed to meet the requirements of the *Indian Act* as it was taken in the presence of Agent Mann who falsely declared that he had been authorized by the Superintendent-General to take the surrender.

VII. Analysis

A. *Principles*

[59] The test for granting summary judgment on the basis of absence of a genuine issue for trial is whether the case is so doubtful that it deserves no further consideration (See *Granville Shipping Co v Pegasus Lines Ltd SA*, [1996] 2 FC 853). It is not necessary to show that the plaintiff could not possibly succeed, only that the case is “clearly without foundation” (*Premakumaran v Canada*, [2007] 2 FCR 191).

[60] The parties are required to put “their best foot forward” and cannot rely on a claim that more and better evidence may be available at trial (see *The Red Native Inc v Tyron T Resto Lounge*, 2010 FC 1278).

[61] Importantly, it is well established that a time barred action will be summarily dismissed. (*Riva Stahl GmbH v Combined Atlantic Carrier GmbH* (1999), 243 NR 183 (FCA)).

B. *Issues*

[62] The pertinent issues are:

- What are the applicable time periods?
- What are the relevant principles of discoverability?
- When did the Gainer Report become known or should it have become known to the Plaintiffs?
- What material facts are disclosed in the Gainer Report?
- When did the McMahon Report become known or should it have become known to the Plaintiffs?
- What material facts are disclosed in the McMahon Report?
- Are there any causes of action that were not discoverable prior to November 1991?

C. *Applicable Limitation Period*

[63] The parties agree that the applicable legislation is the 1980 *Limitation of Actions Act* and that the relevant limitations period is six (6) years "from the discovery of the cause of action" as set out in paragraph 4(1)*(e)* of that Act. Both parties characterize the claims as being "actions ground on accident, mistake or other equitable grounds of relief not … specifically dealt with".

[64] As paragraph 4(1)*(e)* incorporates the discoverability principle, the six-year period does not start to run for each cause of action until the material facts were known to the Plaintiffs.

[65] Despite this agreement, pursuant to s 13, the 1980 *Limitation of Actions Act* continues to apply to aboriginal claims <u>only where</u> they are based on a “breach of fiduciary duty alleged to be owed by the Crown”.

Section 13 of the 2000 *Limitations Act* reads much the same, except the starting point is actions brought after March 1, 1999.

[66] In light of the parties’ concurrence that the *Manitoba Métis* decision does not apply to these claims, it is not at all certain that all of the causes of action are based on a breach of fiduciary duty.

[67] If paragraph 4(1)*(e)* of the 1980 *Limitation of Actions Act* does not apply because the cause of action is not based on breach of fiduciary duty, the relevant limitations period is set out in s 3 of the 1996 *Limitations Act*; two (2) years after discovery (s 3(1)*(a)*) or 10 years absolutely (s 3(1)*(b)*). This is clearly a triable issue.

D. *Discoverability Principles*

[68] Although the parties agree on the principles of discovery, the Plaintiffs argue that while the causes of action may have been discovered outside of the limitation period, this issue is not suitable for summary judgment. In part, this is due to the existence of conflicting evidence which

makes the determination unsuitable for summary judgment (see *Aquonie v Galton Solid Waste Material Inc* [1998] OJ No 459, 156 DLR (4th) 222 (OCA)).

[69] There is no reason to depart from the established principles laid down in *Central Trust Co v Rafuse*, [1986] 2 SCR 147, [1986] SCJ No 52 [*Central Trust*] at paragraph 77:

> I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence, as was suggested in *Forster v. Outred*, *supra*, at pp. 765-66. …
>
> (Court underlining)

[70] On the matter of discovery, Justice Carthy in *Peixeiro v Haberman*, (1995) 25 OR (3d) 1, 127 DLR (4th) 475 (OCA) (aff'd [1997] 3 SCR 549) at paragraph 21:

> On my reading of the appellate authorities in Canada since Kamloops, I can see no narrowing of the scope of the rationale expressed by Lord Denning in *Sparham-Souter* and no attempt to confine the principle to particular types of actions, or to premise its application to the particular language of the applicable limitations statute. While this may appear to be a singular example of the court's engagement in legislating, the rule appears to be established that a limitation statute commences to run when the material facts upon which the action is based have been discovered or ought to have been discovered by the exercise of reasonable diligence.

[71] The material facts which must be discovered in order to commence the limitation period are those which are sufficient for a plaintiff to sustain the action and the plaintiff ought

reasonably to have discovered those facts upon which the action is premised (see *Consumer Glass Co v Foundation Co of Canada* (1985) 51 OR (2d) 385 (CA), 20 DLR (4th) 126).

[72] In Alberta, at the relevant time, the discoverability principle was not enshrined in the 1980 *Limitation of Actions Act* but has been in the 2000 *Limitations Act*.

E. *Knowledge and Timing of Gainer Report*

[73] The Plaintiffs acknowledge that the Gainer Report was prepared by TARR and do not dispute the Defendant's assertion that it became known to them in 1978. However, the Plaintiffs say that the Gainer Report did not discover the relevant causes of action, which were not discovered until the Plaintiffs broke from TARR in 1991, hired independent counsel and undertook its own (but undisclosed) research.

[74] Given the Plaintiffs' concession, it is evident that the Plaintiffs were aware of the Gainer Report and its contents by 1978 at the earliest, or 1987 at the latest, in conjunction with the preparation of the McMahon Report.

[75] The case law on discoverability requires the Court to accept that a reasonable person in the circumstances of the Plaintiffs would have read the Report upon being aware of its existence and thereby would have learned the material facts which it contained.

[76] The Plaintiffs' evidence regarding the knowledge and time of acquiring knowledge of the Gainer Report is equivocal. There is little corroborating evidence; however, what is clear is that

the Plaintiffs passed a BCR on September 10, 1973 confirming that the TARR branch of the IAA provide services to the Band to investigate land claims and other treaty and aboriginal rights.

[77] On the balance of probabilities, I conclude that the Gainer Report is the result of the 1973 BCR. Since the Plaintiffs requested that the research be conducted, absent any other clear evidence to the contrary, the Plaintiffs must be deemed to have seen the results of the research in reasonable proximity to the Report's delivery.

F. *Material Facts/Causes of Action Disclosed in Gainer Report*

[78] The Gainer Report disclosed the material facts necessary for the following causes of action:

a) breach of fiduciary duty in brokering the surrender;

b) breach of the *Indian Act* surrender provisions;

c) delay in selling the unrestricted parcels;

d) delay in selling the HBC Lands; and

e) failure to sell the Lake Lands.

[79] Therefore, these causes of action are barred by the application of the six-year limitation period which expired in 1984 (six years after the Gainer Report was prepared) or alternatively 1993 (six years after the Gainer Report was cited in the McMahon Report, which formed part of the Plaintiffs' Specific Claims submission).

[80] The legal issue is whether the Gainer Report disclosed material facts not whether the Report arrived at the legal conclusions in relation to these facts.

[81] The Gainer Report, in respect of the 1909 Surrender, contained several references to Crown agents acting against the Plaintiffs' interests including: acknowledging that advance payments acted to the advantage of the "Department" but to the disadvantage of the "Indian"; and the lack of sympathy, by an Indian agent for Indians' rights, when in conflict with white settlers.

[82] The Gainer Report fully discloses all the material facts necessary to give rise to a claim for breach of the *Indian Act* surrender provisions.

[83] Page 44 of that Report discloses the material facts relating to the delay in selling the non-Lake and non-HBC parcels of land.

[84] However, the Gainer Report does not disclose the necessary material facts concerning concealment by the Crown of its knowledge that the Lake Lands could not, after surrender, be sold.

[85] As found in *Guerin*, at paragraph 115, where there is concealment, the cause of action does not arise until a plaintiff discovers or ought to have discovered the fraud.

[86] There is no evidence that the Plaintiffs either discovered or ought to have discovered the Crown's alleged fraud, upon reading the Gainer Report.

[87] The same comments apply in respect to the HBC Lands where concealment is also an issue.

G. *Causes of Action Disclosed by the McMahon Report*

[88] The claim regarding the *Indian Act* surrender provisions has been abandoned and was already discovered in the McMahon Report.

H. *Awareness or Ought to be Aware of the McMahon Report*

[89] Given the Plaintiffs' concession, the McMahon Report became known to the Plaintiffs in 1987 at the latest.

I. *Discovery of other causes of action prior to 1991*

[90] The Defendant has not proven that the material facts necessary to give rise to the following actions were known or should have been known by the Plaintiffs outside the limitation period:

- breach of fiduciary duty by accepting the surrender of the HBC Lands when the Crown knew or ought to have known that these lands could not be sold at that time;

- failure to advise the Plaintiffs of the restrictions on the sale of the HBC Lands at the time of surrender;
- breach of fiduciary duty by accepting the surrender of the HBC Lands when the Crown knew or ought to have known that these lands could not be sold;
- failure to advise the Plaintiffs of the restrictions on the sale of the Lake Lands at the time of surrender; and
- surrender of mineral rights or subsequent alienation of these rights to third parties.

VIII. Conclusion

[91] I would dismiss the Crown's motion for summary judgment of those claims referred to in paragraph 90.

[92] I would allow the Crown's motion based on the Gainer Report's disclosure in 1987 in respect to the following claims:

- breach of fiduciary duty in brokering the surrender;
- breach of the *Indian Act* surrender provision;
- delay in selling the unrestricted parcels;
- delay in selling the HBC Lands; and
- failure to sell or lease the Lake Lands.

[93] As success is mixed almost evenly, each party will bear their own costs.

ORDER

THIS COURT ORDERS that:

1. The Defendant's motion for summary judgment of those claims referred to in paragraph 90 of the Reasons is dismissed;
2. The Defendant's motion based on the Gainer Report's disclosure in 1987 in respect of the claims referred to in paragraph 92 of the Reasons is allowed; and
3. Each party is to bear their own costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2439-97
STYLE OF CAUSE:	THE LOUIS BULL BAND, CHIEF SIMON THREEFINGERS, JONATHAN BULL, JOSEPH DESCHAMPS, CLYDE ROASTING, RUSSELL THREEFINGERS, HARVEY ROASTING, ELAINE ROASTING, TELLY RAINE AND IRVIN BULL, the Chief and Councillors of the Louis Bull Band suing in their representative capacity on behalf of all the members of the Louis Bull Band v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 14-16, 2014
ORDER AND REASONS:	PHELAN J.
DATED:	OCTOBER 6, 2014

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